



July 31, 2020

VIA ELECTRONIC MAIL

Regional Freedom of Information Officer
U.S. EPA, Region 6
1445 Ross Avenue (6MD-OE)
Dallas, TX 75202-2733

**RE: Supplemental Freedom of Information Act Request for Communications Regarding
U.S. Environmental Protection Agency's Texas-Related Clean Air Act Actions**

Dear Regional FOIA Officer:

This is a supplemental request for information on behalf of Sierra Club pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. § 2.107. This request supplements existing FOIA Docket No. **EPA-R6-2019-003027**.

Sierra Club also requests a fee waiver for this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.

I. Records Requested

Sierra Club requests the following records created, stored, or **received since January 1, 2018, and the date of any supplemental search in response to this July 22, 2020 request**, concerning EPA's proposed or final actions related to the following **Texas-related** Clean Air Act rulemakings and actions:

- Air Quality Designations for the 2010 Sulfur Dioxide ("SO₂") Primary National Ambient Air Quality Standard— Supplement to Round 2 for Four Areas in Texas: Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County, 81 Fed. Reg. 89870 (Dec. 13, 2016), *or* the Agency's plans to revisit, revise, reverse, reconsider, correct, or conduct additional rulemaking relating to any of those designations. This includes, but is not limited to, any records related to the approval of any Texas state implementation plan relating to compliance with the SO₂

NAAQS in Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County, or any “clean data determination” for any of those areas.

- EPA’s reconsideration or any other rulemaking related to Texas’s inclusion in the 2015 Startup, Shutdown, and Malfunction (“SSM”) State Implementation Plan (“SIP”) Call, 80 Fed. Reg. 33,840 (June 12, 2015), EPA Docket No. EPA–HQ–OAR–2012–0322.
- EPA’s Proposed Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility, which was published at 82 Fed. Reg. 912 (Jan. 4, 2017), or any plan for addressing the Regional Haze Rule’s “Best Available Retrofit Technology” or “BART” requirement for Texas; or
- EPA’s Final Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility, 82 Fed. Reg. 48,324 (Oct. 17, 2017), EPA Docket No. EPA–R06–OAR–2016–0611; FRL–9969–07–Region 6, or any plan for addressing the Clean Air Act’s “reasonable progress” requirements for Texas in either the first or second planning period.

Specifically, we request¹ for the period **beginning January 1, 2018 through the date of fulfillment of this request:**

- (1) All records reflecting communications concerning any of the above-captioned rulemakings **between the EPA Administrator and any EPA staff in the Administrator’s office, EPA Headquarters, or Region 6, and/or any of the following entities:**

- State of Texas;
- Attorney General’s Office of Texas
- Texas Council on Environmental Quality;
- Vistra Energy, Luminant Generation Company, Big Brown Generation Company, Oak grove Management Company, Sandow Power Company, or any subsidiary or affiliate of Vistra Energy or Luminant Generation;
- Balch and Bingham;
- Baker Botts LLP;
- Utility Air Regulatory Group;
- American Electric Power (or Southwestern Electric Power Company);
- Xcel Energy Services, Inc. (or Southwestern Public Service Company);
- Coletto Creek Power;
- NRG Texas Power LLC;
- CPS Energy;
- San Miguel Electric;

¹ We do not intend to duplicate other FOIA requests submitted by Sierra Club. If documents responsive to this request have been produced in response to previous Sierra Club requests, they need not be produced again here.

- and/or any other entity or individual representing any of the above-mentioned companies or the State of Texas;
- (2) All records created, stored, or received by the EPA Administrator, or by other staff in the Office of the Administrator, or Region 6 staff concerning EPA's plan for plan for promulgating, reconsidering, revisiting, revising, implementing collecting data, or conducting notice and comment rulemaking related to any of the above-captioned EPA actions or related presidential memoranda.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, emails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, recordings or notes of meetings, calendar entries, and any other compilation of data from which information can be obtained. As used herein, "and" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

Further, for purposes of this request, the term "records" includes **any personal email messages, calendar entries, telephone voice mails, text messages, or internet "chat" or social media messages**, to the full extent that any such messages fall within the definition of "agency records" subject to FOIA, 5 U.S.C. § 552.

We seek **any** communications concerning EPA's plan for reconsidering, revisiting, collecting data, or conducting additional notice and comment rulemaking related to any of the above-captioned rulemakings **between EPA and any of the entities, individuals, or representative listed above.**

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must "at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions [, if any, you] will claim with respect to any withheld documents." *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you (i.e., on a rolling basis) without waiting until all of the communications and records have been assembled for the time period requested. Sierra Club requests electronic copies of the records whenever possible.

II. Claims of Exemption from Disclosure

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency's justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please

provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

III. Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107, Sierra Club requests that EPA waive all fees associated with responding to this request because the groups seek this information in the public interest and will not benefit commercially from this request.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”² EPA’s FOIA regulations contain an identical requirement.³ The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.⁴ These factors are:

- A. Disclosure of the Information ‘is in the Public Interest because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.’
- (1) **The subject of the request:** Whether the subject of the requested records concerns ‘the operations or activities of the government’;
- (2) **The informative value of the information to be disclosed:** Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities;
- (3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to ‘public understanding’; and
- (4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ 40 C.F.R. § 2.107.

⁴ See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).

B. Disclosure of the Information ‘is Not Primarily in the Commercial Interest of the Requester.’

- (1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
- (2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’⁵

Sierra Club’s request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

A. Public Interest Factor

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”⁶ Sierra Club’s request complies with each of the criteria DOJ has identified for the public interest factor.

i. The request concerns the operations or activities of the government.

Sierra Club seeks information related to EPA’s communications and other records concerning the EPA’s plan for revisiting or reconsidering the above-captioned rulemakings since approximately the time that Mr. Wheeler became the Acting EPA Administrator. Since EPA is an arm of the federal government, such EPA records plainly concern “operations or activities of the government.”⁷

ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.

The records the Sierra Club has requested bear upon EPA’s plan for responding to petitions to reconsider or revisit the above-captioned rulemaking, any records and communications that EPA has received concerning the rule from outside entities, as well as any records related to the Acting Administrator’s meetings with industry and state representatives on or about November 8, 2018. That November 2018 meeting with state and industry representatives was not open to the public, and it is not currently public knowledge whether EPA has, since Mr. Wheeler began his tenure as Acting Administrator or before, received any communication from outside entities, such as industry groups, concerning EPA’s plan for any rulemakings related to the above-mentioned Texas-related EPA actions.

⁵ Markman, *supra* note 4.

⁶ See 40 C.F.R. § 2.107(l)(1).

⁷ See 40 C.F.R. § 2.107(l)(2)(i).

Each of the above-mentioned rulemakings involves industrial emission of sulfur dioxide, oxides of nitrogen, particulate matter, or other hazardous pollutants. Exposure to those pollutants, for even short time periods, such as five minutes, can have significant human health impacts, including the aggravation of asthma attacks and cardiovascular and respiratory failure, leading to increased hospitalizations and premature death.⁸ EPA's health-based standards for sulfur dioxide pollution, its SIP Call for start-up, shutdown, and maintenance exemptions, and its 2016 proposed and final federal implementation plans for addressing the Clean Air Act's regional haze rule requirements were each far more protective of human health than the old standards, and each of those rules and EPA actions promise enormous health benefits citizens throughout Texas and the central United States. EPA's final air quality designations for sulfur dioxide pollution in Texas will govern the stringency of the Clean Air Act state implementation plans ("SIPs") that will be required from each state to ensure achievement and maintenance of the NAAQS. *See* 42 U.S.C. § 7407(a). If an area is designated "nonattainment," then the state must develop and submit a SIP within 18 months of the effective date of that designation that includes requirements that existing sources reduce pollution to ensure attainment of the NAAQS. Under the so-called SSM SIP Call, Texas is required to amend its state implementation plan to remove any affirmative defense or other *per se* exemptions from liability, which effectively allow sources to pollute without limitation (and in violation of the Clean Air Act) during periods of startup, shutdown, or maintenance. Thus, EPA plans for revisiting or reconsidering each of those rules threatens significant and adverse public health impacts on the people living and working in areas designated as nonattainment because withdrawing or revoking those designations would deprive the affected communities of the benefits of safe air to breathe that would accompany emission reductions. Disclosure of EPA's plans for revising these public health protections is "likely to contribute" to public understanding of government operations and activities.⁹

iii. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.¹⁰ The general public is already following issues related to air pollution from coal- and gas-fired power plants, which has frequently been the focus of investigative reports by members of the media.¹¹ Thus, any EPA communications between the State of Texas, the Texas Commission on Environmental Quality, or any regulated entity or individual representing an electric generating utility or the utility industry, concerning EPA's plan for revisiting the above-captioned Texas-related Clean Air Act rollbacks will receive close and critical scrutiny from members of the public and the news media.

⁸ *See* Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520, 35,525 (June 22, 2010).

⁹ *See* 40 C.F.R. § 2.107(l)(2)(ii).

¹⁰ *See* 40 C.F.R. § 2.107(l)(2)(iii).

¹¹ *See, e.g.,* Heather Rogers, ProPublica, *Lobbyists Bidding to Block Government Regs Set Sights on Secretive White House Office*, July 31, 2014, available at <http://www.propublica.org/article/lobbyists-bidding-block-government-regs-sights-set-secretive-white-house>; Eric Lipton and Coral Davenport, New York Times, *Scott Pruitt, Trump's E.P.A. Pick, Backed Industry Donors Over Regulators*, Jan. 14, 2017, https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html?_r=0.

Sierra Club is particularly able to ensure that the information requested will be disseminated to the general public, and plan to do so. Sierra Club is the nation's oldest and largest grassroots environmental organization, with more than 2.7 million members and supporters, including online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through an extensive digital communications network and online information system, print magazine, radio show, web videos, and news reports.

Sierra Club is a national non-profit conservation organization with tens of thousands of members, supporters, and local chapters in Texas and throughout the nation dedicated to protecting and enhancing air quality across the nation.

To further those interests, Sierra Club has played significant roles in numerous administrative and judicial proceedings that directly relate to the enforcement and implementation of each of the above-captioned Clean Air Act rulemakings in Texas. In particular, Sierra Club has participated in several rulemakings and judicial proceedings related to implementation and enforcement of the health based standard for sulfur dioxide pollution in Texas. In fact, Sierra Club submitted extensive expert analysis and legal comments relating to the above-captioned rulemaking, urging EPA to protect public health in the communities surrounding the Big Brown, Martin Lake, and Monticello power plants by designating those areas as being in nonattainment with the health-based SO₂ NAAQS. Sierra Club has similarly engaged in EPA's implementation rulemaking for the Texas regional haze rules and the agency's SSM SIP Call. In fact, Sierra Club filed suit against EPA challenging the agency's authority to create an "affirmative defense" in a nationwide regulation issued under section 112 that limited hazardous emissions from cement kilns. *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). After the D.C. Circuit invalidated EPA's affirmative defense, Sierra Club filed a petition for rulemaking that was the catalyst for EPA's subsequent SIP Call. Sierra Club has engaged in similar administrative and judicial proceedings across the country to fulfill their missions to protect and enhance the quality of the human environment.

In addition, Sierra Club has the "ability and intention" to convey the information sought by the FOIA request to the public.¹² The Sierra Club can publicize information received from this request in monthly electronic newsletters, through social media, and email action alerts, which together reach hundreds of thousands of members, supporters, and subscribers. The Sierra Club's communications staff can also disseminate newsworthy information obtained from this request to the media.

In sum, the Sierra Club has the ability to digest and quickly disseminate information gleaned from FOIA requests to the general public, and will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public comments and further action regarding EPA's plan for reconsidering, revisiting, collecting data, or conducting additional rulemaking related to the above-captioned rulemaking. Indeed, the material responsive to this FOIA request will not only inform the Sierra Club's legal and technical comments regarding any future rulemaking, but the materials will be disseminated to inform and urge the public to participate in the rulemaking. Thus, Sierra Club is uniquely well positioned to analyze and publicize the requested information.

¹² See, e.g., Markman, *supra* note 4.

iv. The information will contribute “significantly” to public understanding of government operations or activities.

The information Sierra Club seeks will contribute “significantly” to the ongoing public conversation about pollution from coal- and gas-fired power plants.¹³ None of the materials the groups have requested are now widely known (if they have been made public at all), yet they are essential to the public’s understanding of EPA’s plan for responding to petitions for reconsideration or revisiting the above-captioned rulemakings, or any communications with outside entities concerning those rules.

In particular, on November 8, 2018, EPA issued a press release touting its meeting with state and industry stakeholders, and its plans to revisit or reverse the above-captioned rulemakings. According to information obtained by Sierra Club, Acting Administrator Wheeler expressed an intent to reverse EPA’s area designations for the sulfur dioxide NAAQS, which he referred to as based on “bogus” air quality modeling. Mr. Wheeler’s comments are directly inconsistent with EPA’s own findings regarding the reliability of air quality modeling that demonstrated that several areas of Texas were, in fact, violating the NAAQS. These are the same arguments that industry interests raised during those earlier rulemakings, and which EPA flatly rejected as being without merit. Moreover, given his connections to coal- and fossil-fuel industry interests and his stated intention to roll back public health protections, Mr. Wheeler’s his statements raise the specter of arbitrary and unlawfully pre-judged agency action. As discussed above, Sierra Club will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy, including in any future public proceedings concerning these rules. Releasing this information will, thus, significantly enhance public understanding of any EPA rulemakings and the agency’s plan for revisiting, reconsidering, or conducting additional rulemaking related to the critical health protections afforded by the Texas area designations.

B. Commercial Interest Factor

Sierra Club is a non-profit organization with no commercial, trade, or profit interests in the requested information. They seek to use this information solely to inform the public and to support advocacy efforts around protecting human health and the environment through effective implementation of the Clean Air Act. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107. If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

¹³ See 40 C.F.R. § 2.107(l)(2)(iv).

Thank you for your assistance processing this request. Please contact me at the email or telephone number below if you have any questions or concerns about this request for information.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Smith', with a long horizontal line extending to the right.

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